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No. 80-990

IN THE

Supreme Court of the United States

October Term, 1980.

CLARENCE E. CABELL, in his official capacity as Acting Chief Probation Officer of Los Angeles County; JACQUALINE HASENSTAB, in her official capacity as Personnel Officer for the Los Angeles County Probation Department; GORDON T. NESVIG, in his official capacity as Chief Personnel Officer for the County of Los Angeles; and the COUNTY OF LOS ANGELES, a body politic,

Appellants,

vs.

JOSE CHAVEZ-SALIDO, RICARDO BOHORQUEZ, and PEDRO LUIS YBARRA,

Appellees.

On Appeal From the United States District Court for the Central District of California.

MOTION TO AFFIRM JUDGMENT.

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Appellants,

vs.

JOSE CHAVEZ-SALIDO, RICARDO BOHORQUEZ, and PEDRO LUIS YBARRA,

Appellees.

MOTION TO AFFIRM JUDGMENT.

Appellees move, pursuant to Rule 16 of the Rules of this Court, for affirmance of the Judgment of the United States District Court for the Central District of California, entered on August 19, 1980. That Judgment declared that California Government Code Section 1031(a) — which states that California State and local government employees must be United States citizens if they hold one of a wide variety of positions which are statutorily classified as "peace officers" and which range from messengers and cemetery employees to police officers — violates the Equal Protection Clause

of the Fourteenth Amendment to the United States Constitution; the Judgment also declared that Appellants, who denied Appellees employment as "peace officers" solely because they were lawful resident aliens, violated 42 U.S.C. §§ 1981 and 1983. This motion is made on the ground that the District Court's Opinion and Judgment conform to, and are based on a careful analysis and application of, prior decisions of this Court. The District Court's decision below represents only one of many cases which will arise as the general principles on citizenship requirements for employment, which have already been established by this Court, are applied on a case by case basis to various State statutes. Therefore, Appellant's Jurisdictional Statement does not present any issues which are worthy of plenary consideration by this Court.

Introduction.

California Government Code Section 1031(a)[1] ["Section 1031(a)"] states that persons who are employed by the State of California or local governmental entities in jobs which are designated by statute as "peace officer" positions must be United States citizens. California Penal Code Sections 830.1 *et seq.*[2] list some of the positions defined as "peace officers," including deputy probation officers employed by local county governments. Other state and local government employees defined as "peace officers" include, for example, cemetery employees, furniture and bedding inspectors, livestock identification inspectors, sealers of the De-

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[1]The full text of California Government Code Section 1031 is reproduced in Appendix A.

[2]California Penal Code Section 830.5(a) is reproduced in Appendix B. A list of peace officer positions is set forth in footnote 22 of the District Court's 1977 Opinion. Jurisdictional Statement, Appendix D, at 55-57.

partment of Weights and Measures, as well as a broad range of people working as part of the criminal justice system.

Appellees Jose Chavez-Salido, Ricardo Bohorquez, and Pedro Luis Ybarra ("plaintiffs") were denied employment by Appellants County of Los Angeles; Clarence E. Cabell, Acting Chief Probation Officer; Gordon T. Nesvig, Chief Personnel Officer; and Jacqualine Hasenstab, Personnel Officer for the Probation Department ("the County"), as deputy probation officers solely because they were not U.S. citizens, as required by Section 1031(a).

In the court below, plaintiffs challenged Section 1031(a) and the refusal of the County to hire them, on the grounds that Section 1031(a) violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and that the County's actions in enforcing that statute denied to plaintiffs rights guaranteed them by 42 U.S.C. §§ 1981 and 1983. Plaintiffs sought declaratory and injunctive relief, and equitable relief in the form of appointment to deputy probation officer positions and back pay.

A trial based on stipulated facts[3] was held on August 20, 1976. On February 3, 1977, the Three-Judge Court, per Irving Hill, D.J., handed down its Opinion, 427 F.Supp. 158 (C.D. Cal. 1977), granting plaintiffs the relief they sought. On February 23, 1977, the District Court entered Partial Judgment.

The County Defendants appealed the Three-Judge Court Judgment, and on May 15, 1978, this Court vacated the Partial Judgment and remanded the case to the District Court for "further consideration in light of *Foley v. Connelie*, 435 U.S. 291, 98 S.Ct. 1767, 55 L.Ed.2d 287 (1978)." *County*

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[3]In addition to a joint stipulation of facts, plaintiffs also submitted uncontested affidavits attesting to their willingness to subscribe to Los Angeles County's loyalty oath.

of Los Angeles et al. v. Jose Chavez-Salido et al., 436 U.S. 901 (1977). On remand the District Court, after reconsidering the initial Judgment in light of *Foley* and the subsequent opinion of this Court in *Ambach v. Norwick*, 441 U.S. 68, 99 S.Ct. 1589 (1979), reaffirmed its 1977 Judgment, with one judge dissenting. 490 F.Supp. 984 (C.D. Cal. 1980).

Plaintiffs submit that the District Court's majority Opinion and Judgment were based on a careful analysis and application of the prior decisions of this Court. As the District Court noted in applying the standards of *Foley v. Connelie*, 435 U.S. 291 (1978) and *Ambach v. Norwick, supra*, deputy probation officers do not fall within California's "political community." Therefore, the District Court found that the requirement of Section 1031(a) that probation officers be U.S. citizens could not withstand strict judicial scrutiny and was unconstitutional. Further, the District Court properly applied *Sugarman v. Dougall*, 413 U.S. 634 (1973), *Foley*, and *Ambach*, in finding California Government Code Section 1031(a) to be overly broad and, therefore, unconstitutional.

ARGUMENT.

I.

AS APPLIED TO PROBATION OFFICERS, CALIFORNIA GOVERNMENT CODE SECTION 1031(a) IS UNCONSTITUTIONAL.

Applying the constitutional principles established by this Court in *Foley v. Connelie, supra,* and *Ambach v. Norwick, supra,* the District Court below examined the functions of deputy probation officers to determine whether the statute requiring such officers to be citizens should be subjected to strict judicial scrutiny or the less demanding rational basis standard of review. The District Court analyzed the role and duties of probation officers within California's scheme of government, and concluded that those officers, unlike New York's police officers in *Foley* and public school teachers in *Ambach*, are not part of the State's "political community;" therefore the Court subjected the statute to strict judicial scrutiny. Since the County offered no compelling interest to justify the discriminatory classification, the District Court declared the statute, as applied to probation officers, unconstitutional.

This Court established general principles for determining whether State statutes limiting employment opportunities to U.S. citizens should be subjected to strict judicial scrutiny in *Foley, Ambach,* and earlier cases cited in those decisions, including *Sugarman v. Dougall, supra* (striking down a statute excluding aliens from State "classified service"), *In re Griffiths,* 413 U.S. 717 (1973) (invaliding the exclusion of aliens from the legal profession), and *Examining Board v. Flores de Otero,* 426 U.S. 572 (1976) (invalidating refusal to license aliens as engineers).

In general, any statute which excludes aliens from employment opportunities must be strictly scrutinized by the

courts unless the affected positions "are so bound up with the operation of the State as a governmental entity as to permit the exclusion from those functions of all persons who have not become part of the process of self-government." *Ambach, supra,* 99 S.Ct. at 1593. The State may prevent aliens from holding " 'important nonelective . . . positions, for officers who participate directly in the formulation, execution, or review of broad public policy [and] perform functions that go to the heart of representative government.' *Id.*, [*Sugarman, supra*] 413 U.S. at 647, 93 S.Ct. at 2850 (citation omitted)." *Id.* In applying these standards, courts "must necessarily examine each position in question to determine whether it involves discretionary decision making, or execution of policy, which substantially affects members of the political community." (footnote omitted) *Foley, supra,* 435 U.S. at 296.

The District Court below carefully followed the instruction of *Foley*, examined the duties of California probation officers, compared the probation officers to, and distinguished them from, the police officers and public school teachers which this Court has found may reasonably be required to be U.S. citizens, and concluded that, in California, probation officers have positions of relatively limited authority and discretion and do not belong to or affect the State's "political community."

This Court need not take plenary action to review whether the District Court properly applied the controlling standards to the facts of this case. The record amply supports the District Court's conclusion that California probation officers hold positions of much more limited authority, discretion, and effect than police officers and public school teachers, and are not at the heart of the State's representative government.

In assessing the role of New York state troopers, this Court noted that they occupy a government position involving "a very high degree of judgment and discretion, the abuse and misuse of which can have serious impact on individuals." *Foley, supra*, 435 U.S. at 298. The state trooper is "vested with . . . plenary discretionary powers" the execution of which substantially affects the lives of members of the general public. *Id.* As this Court emphasized: "A policeman vested with the plenary discretionary powers we have described is not to be equated with a private person engaged in routine public employment or other 'common occupations of the community' who *exercises no broad power over people generally.*" (emphasis added) *Id.* Specifically, New York state troopers were found to have the following powers over members of the public: to invade the privacy of an individual in public places, to break down doors to enter people's homes, to stop vehicles on public highways, to conduct searches, to arrest without a warrant, and to carry deadly weapons. *Id.*

On the other hand, probation officers in California, as members of the law enforcement community, simply do not perform the functions traditionally associated with the police. It is the police officer and not the probation officer who is responsible for the prevention and detection of crime, apprehension of suspected criminals, execution of warrants, and search and seizure for arrest; troopers may carry weapons, but probation officers may not. 490 F.Supp. at 989.

The discretionary authority of the deputy probation officer is limited; he does not have the power to affect or interfere with the lives of the general public. For example, the deputy probation officer's power of arrest is restricted to those who are under his supervision and control. As observed by the Court below, "a probation officer may arrest a probationer believed to have violated the terms of his probation for the

purpose of bringing the probationer before a court. The Court may thereafter, in its discretion, issue a warrant permitting further detention. Penal Code Section 1203.2(a). This limited power of arrest contrasts sharply with the general powers of arrest possessed by State Troopers and even ordinary policemen." 490 F.Supp. at 989. The probation officer's other duties and powers include preparation of presentence investigations and reports, supervision of probationers in the areas of health, family, and employment, investigation of probation violations, and various activities concerning juveniles, including the filing of petitions, placement, and supervision. 490 F.Supp. at 988-89.

In short, probation officers in California, unlike New York's state troopers, do not exercise "broad police authority throughout the State." *Foley, supra,* 435 U.S. at 293. They do not exercise "the basic functions of government." *Id.* at 297. Their role does not lie at the heart of California's system of government. The District Court properly concluded, therefore, that probation officers, who serve in a much more limited capacity than police officers, cannot reasonably be required to be U.S. citizens on the basis of *Foley*.

Moreover, the District Court carefully and properly compared probation officers to public school teachers, and again found the probation officer's role to be so circumscribed that a citizenship requirement could not reasonably be required.

In their limited environment, probation officers do not have the same opportunity, responsibility, or obligation to shape the attitudes and values of their probationers toward the government and the American political process as do public school teachers. Appellees recognize that probation officers do provide some counseling and guidance to those under their supervision. But it is the licensed public school

teacher who is responsible for teaching the political process, promoting civic virtues and shaping the attitudes of the general populace toward government. Probation officers deal only for a limited period of time with a very small segment of the population. As stated by the Court below, "[t]he effect of probation officers on the governmental and political process is, we believe, far, far less." 490 F.Supp. at 988.

Probation officers, to be sure, perform an important role in the law enforcement system. Yet the duties of the probation officer involve substantially less discretion and responsibility than the duties of a policeman or public school teacher. Moreover, the probation officer's sphere of influence is substantially less than is the school teacher's or the police officer's. The probation officer deals only with people who have already been brought into the criminal justice system by police, prosecutors and judges. They have no authority over, or official contact with, the general population. Certainly it cannot be said that the probation officer's role goes to "the heart of representative government." *Sugarman, supra,* 413 U.S. at 647. Accordingly, the District Court's conclusion that probation officers are not part of California's "political community" was proper and should be affirmed by this Court. Since the County has offered no convincing rationale for requiring probation officers to be U.S. citizens, the District Court's further conclusion, that California Government Code Section 1031(a), is unconstitutional as applied to probation officers, should be affirmed.

II.

CALIFORNIA GOVERNMENT CODE SECTION 1031(a) IS UNCONSTITUTIONALLY OVERBROAD.

A. Section 1031(a) Limits Too Wide a Range of Positions to U.S. Citizens.

As discussed above, the District Court properly found that Section 1031(a) improperly required California probation officers to be U.S. citizens. Therefore, as applied to plaintiffs, the statute is unconstitutional. Further, because the statute also requires persons filling an excessively broad range of positions (many of which are even more ministerial and limited in effect than probation officer jobs) to be citizens, the entire statute was properly declared unconstitutional by the District Court below on the ground it was overly broad and indiscriminate.

In *Sugarman v. Dougall, supra,* this Court struck down on equal protection grounds a New York statute that barred resident aliens from holding permanent positions in the state's competitive Civil Service. In declaring the law invalid, this Court emphasized the overly broad and indiscriminate nature of the statute; the class of positions for which citizenship was required "reaches . . . positions in nearly the full range of work tasks . . . all the way from the menial to the policy making." 413 U.S. at 640. Although the states have the power to establish the qualifications of voters, elective office holders, and holders of "important nonelective executive, legislative, and judicial positions . . . who participate directly in the formulation, execution, or review of broad public policy . . .," such discriminatory treatment has to be "narrowly confined." 413 U.S. at 647 and 649. This Court explained:

> "We recognize a State's interest in establishing its own form of government, and in limiting participation in that government to those who are within 'the basic

> conception of a political community.' *Dunn v. Blumstein*, 405 U.S. 330, 344 (1972). We recognize, too, the State's broad power to define its political community. But in seeking to achieve this substantial purpose, with discrimination against aliens, the means the State employs must be *precisely drawn* in light of the acknowledged purpose." (emphasis added) 413 U.S. at 642-43.

Thus, in examining state statutes that discriminate against resident aliens, this Court firmly established in *Sugarman* that such discrimination would only be tolerated where the discriminatory classification was precisely tailored and confined to fit the state's objective of defining its political community.

In *Examining Board v. Flores de Otero*, 426 U.S. 572 (1976), this Court again expressed its concern that discriminatory classifications be narrowly defined. In striking down a Puerto Rico statute which restricted the issuance of licenses for the practice of civil engineering to United States citizens, the Court observed:

> "[T]he governmental interest claimed to justify the discrimination is to be carefully examined in order to determine whether that interest is legitimate and substantial, and *inquiry must be made whether the means adopted to achieve the goal are necessary and precisely drawn*." (emphasis added) 426 U.S. at 605.

The holdings in *Sugarman* and *de Otero* were recently reaffirmed in both *Foley v. Connelie, supra*, 435 U.S. 291 and *Ambach v. Norwick, supra*, 99 S.Ct. 1589. In *Foley*, this Court stated that if an employment classification system discriminates on the basis of alienage, the judiciary "must necessarily examine each position in question to determine whether it involves discretionary decisionmaking, or execution of policy, which substantially affects members of the political community." 435 U.S. at 296. In an accompanying footnote, this Court further explained that:

> "This is not to say, of course, that a State may accomplish this end with a citizenship restriction that 'sweeps indiscriminately,' *Dougall*, 413 U.S. at 643, 93 S.Ct., at 2848, without regard to the differences in the positions involved." 435 U.S. at 296-97, n. 5.

In *Ambach v. Norwick, supra*, although this Court upheld New York's exclusion of aliens from public school teaching positions, it was emphasized that the "restriction is carefully framed to serve its purposes, as it bars from teaching only those aliens who have demonstrated their unwillingness to obtain United States citizenship." (footnote omitted) 99 S.Ct. at 1596.

California Government Code Section 1031(a) does not meet the requirement of *Sugarman* and *De Otero*, as reaffirmed in *Foley* and *Ambach*, that statutes restricting the employment opportunities of aliens be narrowly and precisely drawn. Section 1031(a) affects approximately seventy different job classifications at the state and local governmental levels. As noted by the District Court, the list ranges all the way from important law enforcement positions to positions having apparently insignificant and menial duties. Included in the latter group are sextons and superintendents of a cemetery authority and other cemetery employees, inspectors of the Bureau of Furniture and Bedding Inspection, sealers of the Department of Weights and Measures, and messengers of the State Treasury Office. 427 F.Supp. at 169-70.

Government Code Section 1031(a) fails to account for the differences in the positions affected. Thus, it is ex-

tremely difficult, if not impossible[4] for this Court or any other court to examine the nature and duties of the so-called "peace officers" in the approximately seventy positions affected by this statute. Clearly, the indiscriminate sweep of this statute prevents the Court from examining the "position to determine whether it fulfills a fundamental obligation of government to its constituency." *Foley, supra*, 435 U.S. at 297.

Not only does Section 1031(a) limit an unnecessarily wide and inexplicable range of government positions to citizens, but it is also unconstitutionally overbroad in another way. Section 1031(a) bars all aliens, even those who have declared their intent to become United States citizens, from employment in peace officer positions. In *Ambach*, this Court recognized that such a broad sweep would not be tolerated. The New York statute upheld in that case only excluded from teaching positions those aliens who refused to declare their intent to become United States citizens. The statute in issue here, on the other hand, fails to take into account willingness, desire and efforts to become a citizen.[5]

In sum, when California Government Code Section 1031(a) is examined under the principles established by this Court in *Sugarman v. Dougall, supra, Examining Board v. Flores de Otero, supra, Foley v. Connelie, supra*, and

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[4]The judiciary's search for a rationale for inclusion of so many positions within the classification of "peace officer," and the limitation of those positions to citizens, is not assisted by reference to legislative history. Prior to 1961, "peace officers" did not have to be citizens. In 1961, Section 1031(a) was passed, imposing a citizenship requirement on the pre-existing list of jobs classified as "peace officers." The District Court below could find "no legislative history or legislative findings which supply any basis or rationale for this broad new citizenship requirement." 490 F.Supp. at 986.

[5]As the District Court below found, plaintiff Chavez-Salido had applied for U.S. citizenship before seeking employment with the County as a probation officer. 427 F.Supp. at 160.

Ambach v. Norwick, supra, there can be little doubt that the District Court's judgment merely reflects an application of those principles. The District Court's Judgment in this respect was entirely proper.

B. Appellees May Challenge the Overbreadth of California Government Code Section 1031(a).

The County, relying on *United States v. Raines*, 362 U.S. 17 (1960), and *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), contends that the overbreadth principles recognized in *Sugarman v. Dougall, supra*, cannot be raised by these plaintiffs to challenge the validity of the entirety of Section 1031(a). However, the County's reasoning is flawed and its reliance on *Raines* and *Broadrick* is inappropriate.

In *Sugarman*, this Court declared that a statute which limited public employment opportunities in an overly broad range of positions was unconstitutional because of its excessive reach. In that case, the entire statute was invalidated. Not only could the state not apply it to the plaintiffs before the court and to others seeking the same positions; the statute could be applied to no one.

In this case, as in *Sugarman*, plaintiffs are persons who were denied jobs because of a statute which unconstitutionally limited employment in the specific jobs they sought to citizens.[6] Further, in this case as in *Sugarman*, the statute at issue is overbroad in general, and therefore unconstitutional, as to the full range of positions covered, as well as to the positions plaintiffs sought. Thus *Sugarman* directly

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[6]As further discussed below in this section, this Court did not specifically state in *Sugarman* that the named plaintiffs were applying for positions for which a citizenship requirement could not be imposed by any statute, regardless of how narrowly drawn. However, the positions appear obviously ministerial and limited from their titles — clerk-typist, administrative assistant, counselor, and human resources technician. 413 U.S. at 637-38.

supports plaintiffs' claim, and the District Court's holding, that plaintiffs may challenge Section 1031(a) on the ground that it is overly broad, as well as on the ground that it is unconstitutional as applied to them.

Ignoring the direct application of *Sugarman* to this case, the County argues that plaintiffs may not challenge Section 1031(a) as being overly broad since that statute may constitutionally be applied to the probation officer position for which plaintiffs applied. However, as the District Court found, and plaintiffs argue above, the County is wrong — even as applied to plaintiffs, Section 1031(a) is unconstitutional. Thus, the standing of plaintiffs to challenge the entire scope of that statute was established in *Sugarman*. The County's reliance on *Raines* and *Broadrick* — which held that plaintiffs who are *not* unconstitutionally affected by a statute ordinarily cannot challenge the statute as being overly broad — misses the point that plaintiffs here were denied their constitutional rights by Section 1031(a).

However, even if Section 1031(a) were not unconstitutional as applied to persons seeking positions as probation officers, these plaintiffs would not necessarily lack standing to challenge the statute as overly broad. The general principle expounded in *Broadrick* and *Raines* is a flexible one, and has been relaxed when speech and expression are involved, or when parties to a suit stand to lose by its outcome but yet have no effective avenue of preserving their rights themselves. *See Broadrick v. Oklahoma, supra,* 413 U.S. at 611-12.

Further, this Court has already implicitly recognized an exception to the *Broadrick-Raines* doctrine in the area of citizenship requirements applied to employment. In *Sugarman* this Court held that statutes limiting employment to citizens could be struck down as overly broad. In making that decision, this Court did not examine to any extent the

specific jobs that the plaintiffs were seeking. This Court treated the issue as irrelevant, and ignored it. As the District Court below explained in its 1977 Opinion:

> "The prior decisions of the Supreme Court dealing with alienage . . . would appear to rule out consideration of the validity of this statute as applied. Those decisions stress that the scrutiny which should be afforded to such a statute must include an examination of whether it is too broad in its sweep, overinclusive. That is why we, as the Court did in *Sugarman*, have examined all of the types of positions for which citizenship is required." 427 F.Supp. at 171.

Accord 490 F.Supp. at 987.

Clearly, Appellees have standing to challenge the facial overbreadth of California Government Code Section 1031(a).

Conclusion.

For the above reasons, Appellees submit that the County's Jurisdictional Statement does not present any issue worthy of plenary consideration by this Court. Therefore, Appellees urge the Court to summarily affirm the District Court's Judgment.

Dated this 13th day of February 1981 at Los Angeles, California.

Respectfully submitted,

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APPENDICES

APPENDIX A.

Government Code § 1031. Public Officers or Employees Having Powers of Peace Officers; Minimum Standards.

Each class of public officers or employees declared by law to be peace officers shall meet at least the following minimum standards:

(a) Be a citizen of the United States;

(b) Be at least 18 years of age;

(c) Be fingerprinted for purposes of search of local, state, and national fingerprint files to disclose any criminal record;

(d) Be of good moral character, as determined by a thorough background investigation;

(e) Be a high school graduate or pass the general education development test indicating high school graduation level; provided that this subdivision shall not apply to any public officer or employee who was employed, prior to the effective date of the amendment of this section made at the 1971 Regular Session of the Legislature, in any position declared by law prior to the effective date of such amendment to be peace officer positions;

(f) Be found, after examination by a licensed physician and surgeon, to be free from any physical, emotional, or mental condition which might adversely affect his exercise of the powers of a peace officer.

This section shall not be construed to preclude the adoption of additional or higher standards, including age.

APPENDIX B.

§ 830.5 Correctional, parole and probation officers.

(a) Any parole officer of the State Department of Corrections, placement or parole officer of the Youth Authority, *probation officer, or deputy probation officer is a peace officer*. Except as otherwise provided in this subdivision, the authority of any such peace officer shall extend only as to conditions of parole or of probation by any person in this state on parole or probation, or to the escape of any inmate or ward from a state institution, or to the transportation of such persons. The authority of any parole officer of the State Department of Corrections shall further extend to violations of any penal provisions of law which are discovered in the course of and arise in connection with his employment. (emphasis added).